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No. 99-387

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In The

# Supreme Court of the United States

THOMAS E. RALEIGH, Chapter 7 Trustee for Estate of William J. Stoecker,

*Petitioner,*

v.

STATE OF ILLINOIS, DEPARTMENT OF REVENUE,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## BRIEF *AMICI CURIAE* FOR THE STATES OF NEW MEXICO, ARIZONA, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, IOWA, KANSAS, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, NORTH DAKOTA, OHIO, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, WASHINGTON AND WYOMING IN SUPPORT OF RESPONDENT

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## INTEREST OF *AMICI CURIAE*

One of the primary law enforcement responsibilities of state government is ensuring that citizens comply with state tax laws. The *amici* states have a vital interest in this case. The decision below must be affirmed in order to ensure that the bankruptcy court does not become a master state and federal tax court. If the burdens of proof are more favorable in bankruptcy court than in state tribunals, the result will significantly, unfairly and erroneously hamper the enforcement of state tax laws. Simply stated, the bankruptcy courts could become a tax haven.

At issue is whether a taxpayer who has the burden of proof under state law can shift the burden to the government by filing for bankruptcy. The bankruptcy court's consideration of the validity of a tax claim is not a rare or unusual situation. Slightly more than 1.3 million bankruptcies were filed in calendar year 1999 in the United States. Nearly 400,000 of those cases were Chapter 13 or Chapter 11 cases where the debtors/taxpayers were the real parties in interest.[1] The vast majority of the remaining cases were "no-asset" Chapter 7 cases, in which little, if any, litigation took place.[2] The remaining minority, the "asset" cases, involved a Chapter 7 trustee administering and distributing those assets. An enormous amount of tax

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[1] 1,319,465 bankruptcy petitions were filed in calendar year 1999. Of those, 382,214 were Chapter 13 cases and 9,315 were Chapter 11 cases. *See News Release*, Administrative Office of the U.S. Courts, March 3, 2000, reprinted at http://www.uscourts.gov/Press___Releases/cy99bk.pdf. Although the total numbers have declined somewhat since the record high filing levels of over 1.4 million cases in 1998, Chapter 11's have actually increased and the decline in Chapter 13's has been slight. *Id.*

[2] *See* Administrative Office of the U.S. Courts' Publication entitled *Bankruptcy Basics* at 3 and 14, reprinted at http://www.uscourts.gov/bankbasic.pdf.

revenues are subject to the review and control of the bankruptcy courts.[3]

On several occasions, this Court has noted that burden of proof is an issue of substantive law. It will often determine the prevailing party in a legal proceeding. In the tax context, a rule of requiring the taxpayer to bear the burden of proof is essential and promotes the policies of tax administration. The alternative of requiring the government to disprove a claimed deduction of the taxpayer, for instance, would not only be impractical, it would seriously undermine the companion laws requiring taxpayers to keep adequate documentation. Moreover, the government's relative lack of knowledge of the particulars of the taxpayer's financial affairs makes placing the burden of proof on the taxpayer necessary and fair. Placing the burden of proof on the government in bankruptcy cases will promote forum shopping, reward irresponsibility, and increase the burden on other taxpayers because of the loss of tax revenue.

## SUMMARY OF ARGUMENT

1.) There has never been an established bankruptcy policy assigning uniform burdens of proof, as the petitioner argues, nor should there be. In fact, the majority of cases under the Bankruptcy Act properly applied nonbankruptcy law burdens of proof when addressing an objection to a tax claim.

2.) The Seventh Circuit's decision below to apply the state law burden of proof to Illinois' tax claim is consistent with both federal statutory and common law and with this Court's decisions. *See* 28 U.S.C. § 1652 (state

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[3] Francis M. Allegra, *Bankruptcy Courts: The Tax Forum for the '90s* 38 FED. BAR NEWS AND J. 338 (August 1991) (reporting that in 1991, the nine largest bankruptcy tax claims totaled $9.6 billion in federal taxes).



law provides the "rules of decision in civil actions" in which state law is decided in federal court); *Butner v. United States*, 440 U.S. 48 (1979) (unless Congress specifically states otherwise, the basic rule in bankruptcy is that state law determines the substantive rights of the parties). The court below correctly determined that in a bankruptcy proceeding the party seeking to refute the tax assessment has the ultimate burden of proving its claim. The court succinctly stated that "bankruptcy is not a 'free-for-all balancing act.'" *In re Stoecker*, 179 F.3d 546, 551 (7th Cir. 1999) (citation omitted).

3.) Bankruptcy courts hear a wide range of issues, especially at the claim objection stage. Because bankruptcy courts often are the forum for litigating purely state-law issues, issues which do not implicate any provision of the bankruptcy code, the *Erie* doctrine should be clearly applicable in bankruptcy when such nonbankruptcy issues are addressed.

4.) A review of cases indicates that only as against the government have some courts been attempting to fashion a "uniform" rule. In other contexts, when nonbankruptcy law requires varying burdens or standards of proof, other than the ordinary plaintiff-carries-the-burden rubric, the courts have perceived no conflict with bankruptcy policy and applied nonbankruptcy law. The so-called uniform rule has never been uniformly applied, and in fact, has been discriminatorily applied. A truly "uniform" policy regarding burdens of proof when litigating nonbankruptcy law in bankruptcy court would make no sense.

5.) If the opinion below is not affirmed, the bankruptcy courts could become the tax court of choice for both state and federal tax disputes. The petitioner asserts that when a claim objection is filed, the dispute ceases being one between the taxpayer and the government and instead becomes one between the government and the

taxpayers' creditors. This is not the *amici* states' experience. Although the dispute here is between the state of Illinois and a chapter 7 bankruptcy trustee for the creditors, most tax litigation in bankruptcy court involves direct disputes between the government and the taxpayers. Whatever rule the Court crafts will presumably apply in other cases as well. The petitioner seeks a result which will "funnel people with tax problems into the bankruptcy courts, and thus undermine the enforcement of state tax law." *Thinking Machines v. New Mexico Tax. and Rev. Dept.*, 211 B.R. 426, 431 (D. Mass. 1997). Firmly established federal policy indicates a reluctance to interfere with state tax laws, and indicates that reorganizing businesses should not have a competitive advantage with regard to tax liability. Moreover, the decision below is in harmony with Congress' intent that tax claims be paid as shown by the priority and exception from discharge afforded those claims.

## ARGUMENT

### I. THERE HAS NEVER BEEN A BANKRUPTCY POLICY REGARDING UNIFORM BURDENS OF PROOF IN THE CLAIM OBJECTION PROCESS.

Confusion has arisen over the effect of Rule 3001(f), of the Federal Rules Bankruptcy Procedure, which states that "[a] proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim." Some courts have construed this *initial* prima facie effect of claims as containing a negative implication that the *ultimate* burden of proof is *always* on every creditor. *In re Fidelity Holding Co.*, 837 F.2d 696 (5th Cir. 1988). No such result was intended. Rule 3001(f) is merely an adaptation of *Whitney v. Dresser*, 200 U.S. 532 (1906), *aff'g In re Dresser*, 135 F. 495 (2d Cir. 1905).



In *Whitney v. Dresser* the trustee had objected to a proof of claim seeking payment on a debt for moneys loaned, alleging that the obligation was not owed by the company but, rather, by its principal. After the trustee's testimony, the referee granted the creditor's motion to strike the trustee's objection to the proof of claim and allowed the claim without the creditor having to put on his case. *In re Dresser*, 135 F. 495, 497. The following issue was ultimately put before this Court: Does a proof of claim have some prima facie evidentiary validity which must be overcome by an objector, as an initial matter, or rather, does the trustee have the rights of a defendant in a civil lawsuit which require the claimant to prove up the case whenever the debt is merely denied? *Whitney v. Dresser*, 200 U.S. at 534-35. In *Dresser*, the Court of Appeals stated that if "a proof of claim in bankruptcy [were] entitled to no greater weight than a complaint in an ordinary action at law the most serious results will follow. Any vindictive or contumacious creditor can, by filing objections, compel creditors to come from distant states and even from foreign countries to testify in support of their claims before a word of testimony impeaching their validity has been adduced." 135 F. at 498.

This Court affirmed the Court of Appeals and ruled that a proof of claim has some probative force that must be met with evidence. *Whitney v. Dresser*, 200 U.S. at 534-535. Justice Holmes succinctly identified the issue that is presently before the Court and distinguished that issue from the evidentiary weight to be given a sworn proof of claim: "It is not a question of the burden of proof in a technical sense – *a burden which does not change, whatever the state of the evidence* – but simply whether the sworn proof is evidence at all." *Id.* (emphasis added).

In 1938, Congress amended § 57n of the National Bankruptcy Act of 1898 (hereafter the Act) to require that government claims be "proved and filed in the manner provided in this section," as the petitioner correctly

states. Brief of Petitioner 11; 52 Stat. 840, 867 (1938). Petitioner implies, however, that this statutory change indicated a congressional intent to affect the burdens of persuasion. Brief of Petitioner 8. But the petitioner misconstrues the simple reason for this change. "The provision in respect to government claims is added in order to overcome the decisions which hold that the bar time for filing claims is not binding on the sovereign." H.R. Rep. No. 1409, 75th Cong., 1st Sess. at 13 (1937). The term "prove" was not defined in the Act, but when used in legal matters and proceedings it is understood to mean "to establish, to render or make certain." Black's Law Dictionary 1224 (6th ed. 1990). Nothing in the history of the amendment to § 57n indicates that it had anything whatever to do with allocating burdens of persuasion. The obvious intent of the requirement that government claims be "proved and filed" on time was merely that a *proof* of claim be *filed* timely.[4] "Redundancies across statutes are not unusual events in drafting. . . . " *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253 (1992). Although the terminology "proof of claim" has been retained in the Bankruptcy Code, the Code no longer refers to claims being "proved."

Prior to 1960, section 57a of the Act (11 U.S.C. § 93a), provided that proofs of claim consisted of, among other things, "a statement under oath, in writing, and setting forth the claim." 52 Stat. 840, 866 (1938). In a 1960 amendment to § 57a of the Bankruptcy Act, Congress removed the requirement that proofs of claim be under oath, while, at the same time, codifying the "prima facie evidence" effect of a proof of claim originally announced in *Whitney*

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[4] At the time, courts equated "proving" a claim with filing a claim which complied with the statutory requirements. *Burton Coal Co. v. Franklin Coal Co.*, 67 F.2d 796, 800 (8th Cir. 1933); *In re Noble*, 15 F. Supp. 648 (W.D.N.Y. 1936).



*v. Dresser*, 200 U.S. at 535-36. From 1960 until the Bankruptcy Code became law in 1979, the last sentence of § 57a of the Act read: "A proof of claim filed in accordance with the requirements of the Bankruptcy Act, the General Orders of the Supreme Court, and the official forms, even though not verified under oath, shall constitute prima facie evidence of the validity and amount of the claim." Pub. L. No. 86-519, 74 Stat. 217 (1960). Merely removing the requirement that claims be under oath does not evidence any intent to expand *Whitney v. Dresser's* singular, manifest rule that proofs of claim constitute prima facie evidence.

In the early 1970's, a concerted effort to arrive at comprehensive procedural bankruptcy rules was made and Bankruptcy Rule 301 was adopted. Subsection (b) of that rule stated that "[a] proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim." According to the 1971 Advisory Committee's Note, the rule was an "adaptation of section 57a of the Act." No statute similar to § 57a of the Act was provided in the Bankruptcy Code when enacted, although Rule 301 continued to apply under the Code until 1983. The Rules were substantially revised again in 1983 and the provisions of Rules 301 and 302 were combined into Rule 3001.[5] Rule 3001(f) used the precise language as former Rule 301(b) and very similar language to § 57a of the Act. Fed. R. Bankr. P. 3001(f).

From this discussion two things are apparent: (1) Nothing in Rule 3001(f), or its predecessors, indicates an intention to alter the underlying substantive laws regarding burdens of proof, and (2) the Rule was derived from

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[5] The format was changed from three-digit to the current four-digit format, among other changes. In 1991, the official citation of the Bankruptcy Rules was changed to Federal Rules of Bankruptcy Procedure. Fed. R. Bankr. P. 1001.

*Whitney v. Dresser's* intent *to protect creditors* against having to travel "from distant states and even from foreign countries" to defend against unsupported claim objections. *In re Dresser*, 135 F. at 498; Fed. R. Bankr. P. 3001(f). The modest protection for creditors provided by *Whitney v. Dresser* and the subsequent statutory and regulatory adaptations cannot be read as assigning the ultimate burden of proof to creditors who were not otherwise required to bear those evidentiary burdens. As Justice Holmes stated, "[i]t is not a question of the burden of proof . . . which does not change. . . . " 200 U.S. at 534-35.

Most cases involving the issue of the ultimate burden of proof in regard to tax claims decided under the Bankruptcy Act appear to have apprehended the singular significance of *Whitney v. Dresser* in attaching evidentiary value to a proof of claim, the similar effect of both the corresponding amendment of § 57a of the Act, in 1960, and the adoption of Rule 301(b), in 1971. The clear majority of Act cases ruled that the ultimate burden of proof did not shift to the government when a tax claim was litigated in bankruptcy court. Although the petitioner cites contrary authority, the more numerous cases supporting the respondent are set out in the margin.[6] The

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[6] *See, e.g., In re Uneco, Inc.*, 532 F.2d 1204 (8th Cir. 1976) (trustee had burden of proving bad debt deduction in dispute with IRS); *Paschal v. Blieden*, 127 F.2d 398 (8th Cir. 1942) (burden of proof was on trustee to prove assessment incorrect); *In re Lang Body Co.*, 92 F.2d 338, 341 (6th Cir. 1937), *cert. denied sub nom. Hipp v. Boyle*, 303 U.S. 637 (citing nonbankruptcy law, court ruled that trustee had burden of proving that property taxes were arbitrary; standard of proof was clear and convincing evidence); *United States v. Knox Powell Stockton, Co.*, 83 F.2d. 423 (9th Cir. 1936); *In re Canady*, 43 A.F.T.R. 2d 79-472 (N.D. Ga. 1978) (nonbankruptcy burden of proof applies in objection to tax claim); *In re Menefee*, 40 A.F.T.R. 2d 77-5006, 5013 (E.D. Mo. 1977) (bankrupt had burden of proof on IRS counterclaim to



divided case authority under the Act, coupled with the fact that the Code does not address the issue, establishes,

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action initiated by bankrupt); *In re Certified Credit Corp.*, 329 F. Supp. 1402 (S.D. Ohio 1971) (presumption of correctness of IRS assessment continued in bankruptcy; trustee had the burden of proving deductions; taxing authorities' entitlement to nonbankruptcy burden of proof is no different than any other creditor's right to require that the debtor prove certain defenses or setoffs); *In re Standard Mill*, 324 F. Supp. 386, 390 (N.D. Tex. 1970) (trustee had burden to prove that property tax valuation was grossly exaggerated under Texas law); *In re Reeves*, 25 A.F.T.R. 2d 70-761, 764 (D. Colo. 1970) (objecting party has burden of proof when tax claim is objected to in bankruptcy court); *In re Parr*, 205 F. Supp. 492, 497 (S.D. Tex. 1962) (adopting Internal Revenue Code burdens of proof, trustee had burden of proof of overcoming assessment if no fraud is claimed; IRS has burden on fraud); *In re Oxford Ass'n*, 10 A.F.T.R. 2d 5957 (D.N.J. 1962); *In re Ward*, 131 F. Supp. 387 (D. Colo. 1955) (objecting party had burden of proof on objection to tax claim); *In re Petersilge*, 70 F. Supp. 95, 96 (N.D. Ohio 1946) (adopted Ohio law regarding burden of proof for overcoming sales tax assessment); *In re Garfield Bag & Stationery Co.*, 42 F. Supp. 708, 711 (S.D.N.Y. 1941) (trustee had burden of proving deductions in city's business and sales taxes); *In re Glotzer*, 42 F. Supp 712 (S.D.N.Y. 1941); *In re Raflowitz*, 37 F. Supp. 202, 207 (D. Conn. 1941) (presumption of correctness of tax assessment continues in bankruptcy); *In re Lasky*, 38 F. Supp. 24, 30 (N.D. Ala. 1941) (burden of proof on trustee to overcome property tax assessments); *In re Gandolfi & Co.*, 42 F. Supp. 706 (S.D.N.Y. 1940); *In re Trustees System Co. of Louisville*, 30 F. Supp. 361 (W.D. Ky. 1939); *In re Mid America Co.*, 31 F. Supp. 601, 606-07 (N.D. Ill. 1939) (trustee had burden under Illinois law of disproving issue regarding employment taxes); *In re Bell*, 34 F.2d 677, 680 (D. Pa. 1929) (trustee had burden of proof on IRS deduction), *modified*, 39 F.2d 361 (3d Cir. 1930); *In re Glover-McConnell Co.*, 9 F.2d 683 (D. Ga. 1925); *In re Shackelford*, 3 B.R. 42 (Bankr. W.D. Mo. 1980) (in an action designated as discharge complaint by bankrupt, but was in effect action seeking to determine that bankrupt owed no taxes, bankrupt had burden of proof); *In re Osborn*, 4

at best, that there was never an accepted understanding regarding taxing authorities and the ultimate burden of proof in bankruptcy. In commenting on the similar development of the law regarding certain creditors' ability to obtain relief from the stay to foreclose on their collateral, the Court noted that "[t]he at best divided authority under [the Act] removes all cause for wonder that the alleged departure from it should not have been commented upon in the legislative history." *United Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 381-82 (1988).

## II. THE COURT SHOULD AFFIRM BASED ON THE UNDERLYING PRINCIPLES OF *BUTNER v. UNITED STATES*, 440 U.S. 48 (1979) AND 28 U.S.C. § 1652.

The Bankruptcy Code does not address the issue of burden of proof when claims are litigated in bankruptcy court. In the most general terms possible, Congress has stated only that, "if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency. . . . " Bankruptcy Code § 502(b). Similarly, § 505(a)(1) permits the court to "determine the amount or legality of any tax. . . . " Bankruptcy courts are units of the district courts. 28 U.S.C. § 151. The Federal Rules of Evidence apply in the bankruptcy courts. Fed. R. Evid. 101.

Where an issue of state law is to be determined in federal court, the rules for making the decision are provided by state law. 28 U.S.C. § 1652. The traditional and

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B.R. 431 (Bankr. W.D. Mo. 1979) (bankrupt had burden of proof on IRS counterclaim asking for judgment for taxes owed); *In re O'Neill*, 80-2 U.S.T.C. (CCH) ¶ 9716 (Bankr. W.D. Va. 1980) (in action brought jointly by bankrupt and trustee to declare that no taxes were owed, bankrupt and trustee had burden of proof).



well recognized rule of tax law is that the ultimate burden of persuasion is placed on the taxpayer. *E.g., Stohr v. New Mexico Bureau of Revenue*, 90 N.M. 43, 559 P.2d 420 (Ct. App. 1976).[7] Rule of Evidence 301 provides that the ultimate burden of persuasion "remains throughout the trial upon the party on whom it was originally cast." Fed. R. Evid. 301. Rule 302 provides that the effect of any presumption arising under state law is to be determined by state law. Fed. R. Evid. 302.

A fundamental principle of bankruptcy law was succinctly stated in *Butner v. United States*, 440 U.S. 48 (1979). "Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." *Id.* at 55. The Court noted that the "basic rule" in bankruptcy proceedings "is that state law governs." *Id.* at 57. "The validity of a creditor's claim is determined by the rules of state law." *Grogan v. Garner*, 498 U.S. 279, 283 (1991) (referring to standards of proof).

As this Court has noted time and time again in diversity cases, burdens of proof are part of the substantive law of the state. *E.g., Dick v. New York Life Ins. Co.*, 359

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[7] A compilation of every state's rules would reveal that there are variations among the states. *See, e.g.*, Ariz. Rev. Stat. §§ 42-1254-D-4 (1999) (appearing to adopt rules similar to I.R.C. § 7491). Although it would appear that the traditional rule that the taxpayer has the burden of persuasion applies in most instances – *e.g., James v. Huddleston*, 795 S.W.2d 661, 663 (Tenn. 1990); *Baker v. Bullock*, 529 S.W.2d 279 (Tex. App. 1975); *Hawes v. LeCraw*, 121 Ga. App. 532, 174 S.E.2d 382 (1970) – attempting to impose a "uniform" rule in bankruptcy court would make the application of state tax law in each state unpredictable, and anything but uniform. In fact, such a uniform bankruptcy rule would, in some manner, conflict with every states' tax laws. See Appendix, Br. Am. Cur. Council of State Governments et al.

U.S. 437 (1959); *Palmer v. Hoffman*, 318 U.S. 109 (1943); *Cities Service Oil Co. v. Dunlap*, 308 U.S. 208 (1939). Consistent with those cases, this Court has ruled that when a federal claim is tried in state court, the state court must apply the federal law burden of proof, noting it "was a part of the very substance of his claim and cannot be considered a mere incident of procedure." *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 248-49 (1942). *See Director, Office of Workers' Compensation Programs, Dept. of Labor v. Greenwich Collieries*, 512 U.S. 267, 271 (1994) (assignment of burden of proof to the claimant under § 7(c) of APA is statutory, and part of the "substantive law" which cannot be overridden by agency regulation; "true doubt" regulation, which shifted the risk of non-persuasion to the employers in Black Lung Benefits and Longshore and Harbor Workers Compensation Act proceedings, held to be invalid).

Whether a liability exists is often determined by which party has the burden of establishing certain claims or defenses, a principal reason why that burden is "a part of the very substance of [the] claim." *Garrett*, 317 U.S. at 249. This Court should not give debtors "a windfall merely by reason of the happenstance of bankruptcy." *Lewis v. Manufacturers Nat'l Bank*, 364 U.S. 603, 609 (1961).

## III. *ERIE v. TOMPKINS*, 304 U.S. 64 (1938) APPLIES IN BANKRUPTCY COURT WHEN PURELY STATE LAW ISSUES ARE BEING LITIGATED IN THE FEDERAL FORUM.

The petitioner argues that *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) does not apply in bankruptcy, Brief of Petitioner at 22, and, instead, that the Court should allocate the burden of proof "in a manner that is consistent with federal policies underlying the Code." Brief of Petitioner at 26. Because *Erie v. Tompkins, supra*, construed the predecessor statute of the Rules of Decision Act, 28 U.S.C.



§ 1652 (state law provides the "rules of decision in civil actions" in which state law is decided in federal court), the petitioner implicitly argues that the Rules of Decision Act does not apply in bankruptcy either. The petitioner's position is erroneous and misses the point.

In many instances, like district courts hearing diversity of jurisdiction cases, bankruptcy courts are the forums in which rights which arise solely from state law are litigated. *See* Paul J. Mishkin, *Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 184-196 (1953) (discussing how certain cases are properly in federal court because they protect a certain federal interest rather than enabling enforcement of a federal law, where purely state law is being addressed; the examples he used were diversity cases, cases involving federally chartered corporations, and suits brought by bankruptcy trustees to acquire moneys owed to the debtor under state law). The *Erie* doctrine is not limited to *diversity* jurisdiction, but applies in all cases of *protective* jurisdiction – cases where the courts are not "vindicating any federally created rights" but where the federal forum is providing for "the protection of some congressionally favored interest." *Hollus v. Amtrak Northeast Corridor*, 937 F. Supp. 1110, 1113 n.3 (D.N.J. 1996) (quoting Mishkin, *supra*, and applying *Erie* in lawsuit brought in federal court pursuant to statute granting jurisdiction in cases where the federal government owned a majority of the shares of one of the corporate parties). "Typically, the purpose of the[ ] federal [bankruptcy] rules has been to accommodate state laws in the compressed process in which assets of the bankrupt are gathered together and distributed to creditors. Whether Congress could dictate the rules of decision in trustees' suits simply because it preferred certain commercial law doctrines over contrary state rules has not been tested in the courts." Carol E. Goldberg-Ambrose,

*The Protective Jurisdiction of the Federal Courts*, 30 UCLA L. REV. 542, 581 (1983).[8]

The bankruptcy jurisdiction statute, 28 U.S.C. § 1334, is different than the general federal question statute, 28 U.S.C. § 1331. There are three components to the bankruptcy jurisdiction statute. Section 1334(a) provides that certain proceedings are exclusively within federal jurisdiction. Section 1334(b) addresses proceedings where jurisdiction is non-exclusive. The current bankruptcy abstention statute, 28 U.S.C. § 1334(c), recognizes that bankruptcy courts hear state law disputes in federal court only because a debtor filed a bankruptcy petition. Granted, federal courts are not *always* required to use "state law to fill the gaps in federal substantive statutes." *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 159 n.13 (1983) (construing whether to adopt a state statute of limitations in lawsuit brought pursuant to a federal statute with no state law equivalent). That is hardly what is happening here. No federal statute provides the basis of liability. "[I]t is the *source* of the right sued upon, and not the ground on which federal jurisdiction over the case is founded, which determines the governing law." *Maternally Yours v. Your Maternity Shop*, 234 F.2d 538, 540 n.1 (2d Cir. 1956). The source of the liability is the Illinois legislature. The Illinois tax debt is by no means an "interstitial . . . detail," *DelCostello, supra*, of the bankruptcy code.[9]

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[8] Ms. Goldberg-Ambrose's article was cited with approval in *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 436 n.11 (1995).

[9] Even in areas that could be designated as a "gap" in federal law, the Court has shown a preference to adopt state law. *See O'Melveny & Meyers v. F.D.I.C.*, 512 U.S. 79, 83-87 (1994) (citing *Erie v. Tompkins* in a lawsuit brought by the FDIC, and refusing to supplement the federal scheme with a common law rule which would displace state law). The bankruptcy court is the forum. The Illinois' tax law provides the obligation and, moreover, Illinois is the obligee. There is simply no "gap" to fill. "To create additional 'federal common-law' exceptions is not to 'supplement' this scheme, but to alter it." *Id.* At 87.



The nature of bankruptcy proceedings makes the conclusion that the *Erie* doctrine applies in bankruptcy inescapable. For instance, in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), this Court struck down the initial jurisdictional scheme accompanying the Bankruptcy Code because the non-Article III bankruptcy courts were authorized to hear state law contract actions without any supervision by the Article III courts. Claim objection proceedings are discrete "contested matters" which are brought pursuant to Federal Rules of Bankruptcy Procedure 3007 and 9014; Rule 9014 incorporates most of the Federal Rules of Civil Procedure, or their bankruptcy equivalents. Claim objection proceedings are obviously "civil actions" seeking to establish or negate liabilities which will generally be derived from state law. "The fact that a suit arises under a law of the United States does not mean that all the issues for decision are federal issues; and nowhere is this more true than in bankruptcy." Hill, *Erie Doctrine in Bankruptcy*, *infra*, at 1034. Nothing in the Rules of Decision Act limits its application to diversity cases. *Morgan v. South Bend Community School Corp.*, 797 F.2d 471, 474-75 (7th Cir. 1986).

The power to administer her tax laws is one of the more important attributes of Illinois' sovereignty. There could hardly be a scenario where the *Erie v. Tompkins* concerns are more applicable:

> [T]he mischievous results of the doctrine [of federal general law] had become apparent. . . . It made rights enjoyed under the unwritten "general law" vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in

> which the right should be determined was conferred upon the noncitizen. Thus, the doctrine rendered impossible equal protection of the law. In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the state.
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> . . . .
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> "But law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State. . . . "

*Erie R. Co. v. Tompkins*, 304 U.S. 64, 74-79 (1938) (citations omitted) (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J. dissenting)).

The *Erie* doctrine was properly applied in bankruptcy matters by the Courts of Appeals in such cases as *In re Madeline Marie Nursing Homes*, 694 F.2d 433, 437 (6th Cir. 1982) (the court reasoned that the *Vanston* doctrine, *infra*, has "never been applied, . . . to oust state law in the original determination of the existence and amount of liability"), and *In re Transystems, Inc.*, 569 F.2d 1364, 1366 (5th Cir. 1978) (whether a party was a secured creditor or equity holder was solely a matter of state law under the *Erie* doctrine). *See Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd.*, 709 F.2d 190, 201 (3d Cir. 1983) (bankruptcy clause enables convenient federal forum to hear a state-created obligations case but does not federalize those relationships); 19 C. Wright, A. Miller & C. Cooper, Federal Practice and Procedure: Jurisdiction 2d § 4520 (1996) (The statement that *Erie v. Tompkins* "applies only in diversity of citizenship cases . . . simply is wrong.").



The petitioner primarily relies on *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 161-63 (1946), and to a lesser extent *Heiser v. Woodruff*, 327 U.S. 726, 732 (1946). Brief of Petitioner at 22-24. Both cases stand for the unremarkable proposition that the *Erie* doctrine does not apply to particular federal interests in bankruptcy. The issue in *Vanston* was the proper treatment of post-bankruptcy interest, which is part and parcel of the federal scheme of distribution. *See* Bankruptcy Code §§ 502(b)(2) (unmatured interest is not allowable on unsecured claims) and 506(b) (post-petition interest is allowable on secured claims). The issue in *Heiser* was whether a claim based on a judgment should be subject to equitable subordination, which is also integral to the federal distributive scheme. *See* Bankruptcy Code § 510(c) (court may subordinate a claim to another claim or class of claims under principles of equitable subordination).

The notion that *Erie* never applies in bankruptcy is overbroad. *See* Alfred Hill, *Erie Doctrine in Bankruptcy*, 66 HARV. L. REV. 1013 (1953) (hereinafter Hill). Hill's article was cited by this Court with approval in *Butner v. United States*, 440 U.S. 48, 52 n.2 (1979), *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 164 n.2 (1987) (Scalia, J., concurring) (the *Erie* doctrine and the Rules of Decision Act are not limited to diversity cases), and *Commissioner v. Estate of Bosch*, 387 U.S. 456, 477 (1967) (Harlan, J., dissenting) (criticizing strict reliance on *Erie* doctrine as applied in federal estate tax case).

Hill's thesis, in his article written nearly 40 years ago, seems eerily apropos to the heart of the dispute before this Court:

> In [*Vanston* and other] cases the Supreme Court has employed general language to the effect that questions of disallowance and subordination are governed by paramount federal law, in view of the bankruptcy objective of equitable distribution. Taken out of context, the language of these

> cases comes close to suggesting that, in search of independent grounds of disallowance or subordination, the bankruptcy courts may range as widely in the field of equity doctrine as the equity court of a state. If this were so, all transactions underlying claims in bankruptcy would in effect be subject to federal review in the light of an overriding federal commercial law.
>
> It is probably safe to assume that no such result was intended. But the problem remains, and it is relatively unexplored, of the extent to which the equity power of the bankruptcy courts may be employed to defeat state-created rights.

Hill, *supra*, at 1013. The Court has an opportunity today to remedy the problem examined by Hill and, as the conflict in the lower courts indicates, was only partially laid to rest by *Butner*.

## IV. A RULE OVERRIDING NONBANKRUPTCY LAW BURDENS OF PROOF HAS ONLY BEEN APPLIED TO TAXING AUTHORITIES. A TRULY "UNIFORM" RULE WOULD BE UNWORKABLE.

The petitioner argues that the "Code's fundamental goal of equality of treatment of creditors is put at risk if one class of creditor . . . is given the benefit of a favorable presumption that is *unavailable to other creditors*." Brief of Petitioner at 27 (emphasis added). To the contrary, however, whenever nonbankruptcy law so provides other creditors *do receive* "favorable presumptions." It is only the taxing authorities that are stripped of their nonbankruptcy rights in the name of "equality." In a variety of nontax circumstances, including claim objection proceedings, courts have had little difficulty ruling that the debtor retains the burden of proof where nonbankruptcy law places the burden of proof on the debtor. *E.g., In re Unioil*, 962 F.2d 988, 994 (10th Cir. 1992) (since party



seeking to prove an accord and satisfaction has the burden of proof under Colorado law, the debtor had the burden of proving an accord and satisfaction in a claim objection proceeding). Many other examples are provided in the margin.[10] While it is *generally* true that claimants –

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[10] *In re Andover Togs, Inc.*, 231 B.R. 521, 530-31 (Bankr. S.D.N.Y. 1999) (in an administrative claim objection proceeding, debtor/tenant had the burden of proving that lease provisions were unenforceable due to equitable estoppel, as required by New York law); *In re Farris*, 194 B.R. 931 (Bankr. E.D. Pa. 1996) (debtor had burden of proving likely Truth in Lending Act violation under nonbankruptcy federal law as any other party raising this defense); *In re El Paso Refining, Inc.*, 192 B.R. 144 (Bankr. W.D. Tex. 1996) (in claim objection proceeding in which debtor was guarantor of debt, court followed nonbankruptcy case law and ruled that debtor had burden of proving that debt between creditor and primary obligor had been satisfied); *In re Brummer*, 147 B.R. 552 (Bankr. D. Mont. 1992) (debtor had burden of proving debt was usurious under Montana law); *In re Biglari Import Export, Inc.*, 130 B.R. 43 (Bankr. W.D. Tex. 1991) (in claim objection proceeding, where creditor had seized collateral prior to petition being filed, debtor had burden of proving that creditor did not exercise reasonable care with regard to repossessed collateral as required by Texas law); *In re Wills*, 126 B.R. 489, 497 (Bankr. E.D. Va. 1991) (summary judgment entered for creditor in claim objection proceeding because debtor had burden of proving by clear and convincing evidence under Virginia law that contractual debt could be avoided on grounds of incapacity); *In re Woehr*, 121 B.R. 743 (N.D. Tex. 1990) (debtor had burden of proving debt usurious under Texas law); *In re Hood*, 95 B.R. 696, 702 (Bankr. W.D Mo. 1989) (debtor had burden under Missouri law of proving that contract was entered into under duress); *The Bible Speaks v. Dovydenas*, 81 B.R. 750, 760 (D. Mass. 1988) (in claim objection proceeding against debtor/church to recover monies obtained on the grounds of undue influence, court applied Massachusetts law which creates presumption of undue influence after a confidential relationship has been established); *In re Borum*, 60 B.R. 516 (Bankr. E.D. Ark. 1986) (debtor had burden of proving usury

as creditors and therefore the functional equivalent of plaintiffs under nonbankruptcy law – usually bear the burden of proof in bankruptcy, as they would outside of bankruptcy, this observation should not form a basis for a so-called *uniform rule*.

> Courts routinely rule . . . that the ultimate burden of proof rests upon the claimant. This is intended to place the claimant in the same position it would have been had the claimant been a plaintiff in a civil action. The application of this rule is problematical when the claimant is a taxing authority.

*In re Thinking Machines*, 203 B.R. 1, 2 (Bankr. D. Mass. 1996), *modified*, 203 B.R. 426 (D. Mass 1997).

Although less frequent, courts have also dealt with issues regarding *standards* of proof in claim objection proceedings.[11] It would seem axiomatic that *standards* of proof are as much a substantive component of a litigant's claim or defense as are *burdens* of proof. *See, e.g., Anderson*

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under Arkansas law); *see also, In re Niles*, 106 F.3d 1456 (9th Cir. 1997) (state law that places burden of proof on fiduciary to properly account for funds was equally applicable in discharge action); *Thomson v. Boswell*, 166 F.2d 106, 108 (6th Cir. 1948) (in railroad reorganization proceeding, estate was liable in an accident involving a passenger vehicle on the train tracks because Arkansas law required railroad operator to affirmatively prove that it maintained an adequate lookout).

[11] This should be contrasted with *discharge* proceedings, where this Court has held that, as a matter of bankruptcy law, objections to discharge must be shown by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279 (1991). The *Grogan* case illustrates how the petitioner and many courts have confused different aspects of the bankruptcy process. The purely federal issues involve what is dischargeable and how assets are distributed. The purely nonbankruptcy issues generally involve the amount and legality of the debt as of the petition filing date.



*v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (because plaintiff was required to prove case by "clear and convincing" evidence, court must consider that evidentiary standard when gauging whether a "genuine issue" of fact existed for summary judgment purposes). Similarly, bankruptcy courts applying nonbankruptcy standards of proof in claim objection proceedings have not perceived a conflict with "bankruptcy policy." *E.g., In re Progress Drilling & Marine*, 122 B.R. 62 (Bankr. S.D. Tex. 1990) (creditor's claim disallowed where Texas law required proof of oral contract by clear and convincing evidence). Other examples are provided in the margin.[12]

The authority cited here indicates that when courts have determined the amount of any debt in a bankruptcy case, pursuant to nonbankruptcy law, they have not generally applied either "uniform" burdens or standards of proof. It would seem that courts have fashioned the supposedly "uniform" bankruptcy rule only when they disapproved of the nonbankruptcy law that would enable a creditor, with statutory priority over other creditors, to prevail. Petitioner argues, in effect, that the taxing authorities' statutory priority dictates the result he seeks to achieve here – that Congress has given the government too much. However, this Court has recently ruled that a

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[12] *In re Cutty's Gurnee, Inc.*, 133 B.R. 934, 945 (Bankr. N.D. Ill. 1991) (adopting Illinois law requiring creditor to show existence of equitable lien by clear and convincing evidence); *In re Bastyr & Assocs., Inc.*, 81 B.R. 978, 982 (Bankr. D. Minn. 1988) (in claim objection proceeding, court applied Minnesota law which requires clear and convincing evidence to show oral modification of contract); *In re Emergency Beacon, Corp.*, 48 B.R. 341, 353 n.5 (Bankr. S.D.N.Y. 1985) (clear and convincing standard of proof under New York law applied in objection to claim based on fraud); *In re Kirk*, 114 B.R. 771, 775 (Bankr. M.D. Fla. 1990) (adopting nonbankruptcy federal tax law requiring IRS to prove fraud by clear and convincing evidence).

court may not use equitable principles to override choices made on a legislative level. *United States v. Noland*, 517 U.S. 535, 539-41 (1996). As the court below so astutely concluded, bankruptcy judges are not permitted to indulge in result-oriented decision making, to "cut down the entitlements that creditors seek to enforce in bankruptcy" and to engage in "[a]n equity free-for-all [which] would engender confusion and uncertainty and increase the strategic incentives to petition for bankruptcy." *In re Stoecker*, 151 F.3d at 551.

## V. IF THE OPINION BELOW IS NOT AFFIRMED, THE BANKRUPTCY COURTS COULD BECOME THE STATE AND FEDERAL TAX COURT OF CHOICE. ESTABLISHED POLICY FAVORS NON-INTERFERENCE WITH STATE TAX LAWS AND AVOIDING GIVING DEBTORS A COMPETITIVE TAX ADVANTAGE BY FILING BANKRUPTCY.

Whether to file bankruptcy, and under what chapter, is a generally unilateral decision of the debtor. A debtor does not have to be insolvent to file a bankruptcy petition. *In re Johnson*, 189 B.R. 744, 747 (N.D. Iowa 1995). "But financially strapped or not, a new breed of executives is showing no remorse about wielding bankruptcy as a weapon." Dean Faust, *Chapter 11 Never Looked So Good*, March 20, 2000, BUSINESS WEEK at 44 (discussing the sharp rise in solvent, publicly held corporations filing for Chapter 11). Many courts have held that the bankruptcy code gives a debtor the opportunity to contest a tax obligation, even where all of the deadlines for doing so under nonbankruptcy law have passed. Bankruptcy Code § 505(a); *In re Custom Distribution Serv., Inc.*, 216 B.R. 136, 148 (Bankr. D.N.J. 1997). If the position of the trustee is adopted by the Court, there will be no incentive whatever for taxpayers to exercise their state administrative remedies.



The magnitude of the potential harm to state tax administration is significant. When construing the tax laws, the Court has taken into consideration our "tax system that is so largely dependent on voluntary compliance." *United States v. Generes*, 405 U.S. 93, 104 (1972). The bankruptcy code provides that many taxes are entitled to priority in distribution and are non-dischargeable if they pertain to recent periods, were recently assessed prior to the bankruptcy petition being filed, or were "assessable" after the petition is filed. Bankruptcy Code §§ 507(a)(8)(A) and 523(a).[13] What is intended is that the honest taxpayer who files his returns reflecting a liability will have to deal with the problem, either in bankruptcy or out. If the burden of proof were on the government the incentive to be forthright disappears. There would be no reason to file accurate returns – an audit is scheduled, the records are "lost," and a bankruptcy petition is imminent. The states' audit resources will be wasted.

The states' requirements regarding record keeping and exercising one's administrative remedies could become mere voluntary aspirations. They would often be unenforceable. The provision in the bankruptcy code prohibiting relitigation of tax disputes previously contested in an administrative proceeding, Code § 505(a)(2)(A), would become a fairly hollow protection, because there would be no incentive to utilize such administrative forums. If the decision below is reversed, accountants and tax lawyers could commit malpractice if they do not advise their clients of the benefits of litigating their tax disputes in bankruptcy court. Because bankruptcy courts are bound by the determinations of any administrative tax proceeding, *In re Trans State Outdoor Advertising Co.*,

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[13] Most states' primary revenue source is sales tax, which, if a trust fund tax, is entitled to priority under bankruptcy code § 507(a)(8)(C), and never loses its priority status due to lapse of time.

140 F.3d 618 (5th Cir. 1998), tax professionals would have to be very careful about advising their clients to take advantage of the state forum if the burdens are more favorable in the federal forum. This cannot be what Congress intended. The relationship between bankruptcy code § 505(a)(1) (court may determine tax liability) and § 505(a)(2)(A) (court may not determine tax liability if the tax was contested in a judicial or administrative proceeding prior to bankruptcy), leads to the ordinary conclusion that Congress intended there be no difference in the outcome whether taxes are litigated in or out of bankruptcy.[14]

In fact, section 505(a)(2)(A) (prohibiting relitigation) appears to be an effort by Congress to promote horizontal equity, the notion that the "tax system [is] designed to ensure as far as possible that similarly situated taxpayers pay the same tax." *Thor Power Tool Co. v. Commissioner*, 439 U.S. 522, 544 (1979) (dicta). "A tax system in which the burden of proof is borne by the government does little to encourage the preservation of records held by the taxpayer; on the contrary, such a system would lend itself to easy concealment of tax obligation." Leo P. Martinez, *Tax Collection and Populist Rhetoric: Shifting the Burden of Proof in Tax Cases*, 39 HAST. L. J. 239, 280 (1988) (arguing that political rhetoric regarding shifting the burden of proof is naïve, and that the traditional rule placing the burden on the taxpayer is well-supported historically and logically). "Taxpayers who win the 'hide the ball' game will pay less tax than similar taxpayers who choose not to play." Steve R. Johnson, *The Dangers of Symbolic Legislation: Perceptions and Reality of the New Burden-of-Proof Rules*, 84 IOWA L. REV. 413, 456 (1999) (asserting that the

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[14] *One Lot Emerald Cut Stones and One Ring v. U.S.*, 409 U.S. 232 (1972) (no collateral estoppel or res judicata if losing party in first proceeding could possibly prevail by sustaining a lower standard of proof in second proceeding).



strict conditions in the new federal law purporting to shift the burden of proof to the IRS render the burden shift more symbolic than real, and arguing that a genuine burden shift would cause the government to become more intrusive, make audits and tax litigation more expensive for everyone involved, cause a loss of revenue and would create an incentive to "hide the ball" which would be perceived by the public as unfair).[15] The

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[15] The Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206 (1998), H.R. 2676, amended the Internal Revenue Code to add § 7491 which purportedly changes the burden of proof from the taxpayer to the IRS in the litigation of federal tax matters. The question for bankruptcy practitioners and courts is whether this change in the burden of proof of tax matters has any impact on the litigation of federal tax questions in bankruptcy. The statute states that it pertains to "any court proceeding" with respect to litigation of any federal income and estate and gift tax matter. I.R.C. § 7491(a)(1). The taxpayer will not be entitled to the benefit of this change unless and until four conditions are satisfied: The taxpayer must 1.) satisfy the requirements presently found in the Internal Revenue Code to substantiate any item, 2.) satisfy the requirements to maintain books and records presently found in the Code, 3.) satisfy the requirements of cooperation, including reasonable assistance in obtaining access to witnesses, documents, etc., and 4.) introduce credible evidence with respect to a factual issue relevant to ascertaining the taxpayer's income tax liability. I.R.C. § 7491(a). If the taxpayer satisfies those four conditions the IRS has the burden of proof with respect to "such issue." I.R.C. § 7491(a)(1). If the decision of the Court in the instant case is reversed, however, it could signal support from this Court to disregard the detailed *preconditions* which a taxpayer must fulfill before obtaining the statutory burden shift, I.R.C. § 7491(a)(2). In fact, what the statute actually requires is that the burden will seldom, if ever, shift in federal bankruptcy/tax litigation, which often involves the paradigmatic lack of records problem. Properly understood, the new statute actually underscores the record keeping requirements and the reasons why the burden of proof was

petitioner seeks a result that will promote this gamesmanship.

If a taxpayer initiates an administrative proceeding and then realizes it is going badly bankruptcy will become a ready escape valve. If an administrative or judicial proceeding under state law is pending prior to the filing of the bankruptcy and different burdens of proof apply in the different forums, it would be foolish for a trustee or debtor to permit the nonbankruptcy proceeding to go forward instead of litigating the matter in bankruptcy court to take advantage of the more favorable burden of proof. It is doubtful that Congress intended the anomalous situation in which the very same claim adjudication proceeding would be subject to different burdens of proof depending upon whether the bankruptcy court abstained from hearing the proceeding and deferred to a state adjudication. *See* 28 U.S.C. § 1334(c).

The tax provisions governing priority and discharge in the bankruptcy code, §§ 503(b)(1), 507(a)(8) and 523(a)(1), were enacted to prevent the bankruptcy courts from being used for tax avoidance.[16] But if the petitioner

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traditionally placed on the taxpayer. *See generally,* Steve R. Johnson, *The Dangers of Symbolic Legislation: Perceptions and Realities of the New Burden-of-Proof Rules,* 84 Iowa L. Rev. 413 (1999).

[16] Since tax authorities are creditors of practically every taxpayer, another important element is that tax collection rules for bankruptcy cases have a direct impact on the integrity of the Federal, State and local tax systems. These tax systems, generally based on voluntary assessment, works [sic] to the extent that the majority of taxpayers think they are fair. This presumption of fairness is an asset which should be protected and not jeopardized by permitting taxpayers to use bankruptcy as a means of improperly avoiding their tax debts. To the extent that debtors in a bankruptcy are freed from paying their tax liabilities, the burden of making up the revenues thus lost must be shifted to other taxpayers.

S. Rep. No. 989, 95th Cong., 2d Sess. 13-14 (1978).



prevails here those statutes will become empty formalisms in many instances. The protection that they provide with regard to distribution and discharge will be insignificant whenever the underlying debt is readily and unfairly eliminated outright. While the greater harm lies in the contest of tax matters between debtors and tax authorities, where debtors would be motivated to withhold or destroy evidence, it is not difficult to envision cases where debtors would solicit trustees' cooperation in denying claims for the debtor's benefit, creating collateral estoppel for a subsequent discharge determination.

In *National Private Truck Council, Inc. v. Oklahoma Tax Commission,* 515 U.S. 582 (1995), the Court noted that federal laws must be construed against "the background presumption that federal law generally will not interfere with administration of state taxes . . . ," and that "Congress and [the Supreme Court] repeatedly have shown an aversion to federal interference with state tax administration." *Id.* at 588. The Court has also stated that 28 U.S.C. § 960 indicates "a Congressional purpose to facilitate – not to obstruct – enforcement of state laws." *California Bd. of Equalization v. Sierra Summit,* 490 U.S. 844, 852-53 (1989). *Sierra Summit* ruled that bankruptcy sales were subject to state sales tax, notwithstanding the lack of specific authority for states to tax those sales. The Court stated that state tax law did not need approval before it applied in bankruptcy court, but to the contrary "[i]f Congress wished to declare otherwise, its intent would have to be 'clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt.' " *Id.* at 854.

The Court's reference to 28 U.S.C. § 960, in its *Sierra Summit* opinion, highlights another congressional bankruptcy tax policy. Section 960 was enacted in 1934 in response to judicial decisions holding that bankruptcy estates were not required to pay state and local taxes and to prevent debtors from obtaining a competitive advantage against those operating businesses outside of bankruptcy. Act of June 18, 1934, ch. 585, 48 Stat. 993 (1934) (former 28 U.S.C. § 124a); H.R. Rep. No. 1138, 73d Cong., 2d Sess. (1934); *Palmer v. Webster and Atlas Nat'l Bank*, 312 U.S. 156, 166 (1941) ("Its obvious purpose was to negative the idea that a federal receiver or trustee could ignore the rules of law of the state of operation affecting the conduct of the business committed to his charge.").

The stated justification supporting the reversal of the burden of proof from that generally recognized in nonbankruptcy tax litigation is the bankruptcy policy of fairness to other creditors. Brief of Petitioner at 27; *In re Wilhem*, 173 B.R. 398 (Bankr. E.D. Wis. 1994) (policy considerations which place the burden of persuasion on the taxpayer are unpersuasive in bankruptcy and the policy goals of the bankruptcy system are put at risk when one class of creditors is given the benefit of a favorable presumption which has its origins outside of bankruptcy law; IRS held to have ultimate burden of persuasion). The policy is inapposite here. The petitioner and many courts have failed to distinguish between the determination of the existence of the obligation, under nonbankruptcy rules, and the determination of distribution to creditors of equal priority, under bankruptcy rules.

The petitioner's conclusion that this Court should federalize the burden of proof rules for all tax litigation in bankruptcy court – and treat the tax authority as if it were a typical creditor when determining the amount of the liability – is unworkable. The National Bankruptcy Review Commission recognized the inequities of placing the burden of proof on the taxing authority when it



adopted a proposal to "clarify that the burden of proof/persuasion rules . . . applicable under nonbankruptcy law are equally applicable in bankruptcy court. . . . " REPORT OF THE NATIONAL BANKRUPTCY REVIEW COMMISSION, Recommendation 3.2.5, at 811 (Oct. 20, 1997).[17]

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[17] The Commission's Report explained the reason why Congress should clarify that the burden of proof should be the same in bankruptcy court as it is in nonbankruptcy tax litigation:

> The Government's position as a tax creditor in a claims contest is different from other creditors in a normal debtor-creditor relationship. It is generally the debtor or the debtor in possession who has access to all of the relevant records, information and knowledge required to substantiate or contest the validity of a tax claim. As such, "[t]he common law rule placing the burden on the party with access to the facts seems particularly applicable in a self-assessment system which provides for the taxpayer to make the initial determination of liability" and bolsters the record-keeping requirement the Internal Revenue Code imposes upon taxpayers. To the extent one creditor is prevented from being able to prove its claim due to lack of information, other creditors benefit to the detriment of that creditor. The Recommendation is designed to protect tax creditors from that result.

*Id.* at 816 (citations omitted).

## CONCLUSION

For all of the foregoing reasons, the opinion of the court below should be affirmed.

Respectfully submitted,

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